FILE COPY

FILED
OCT 7 193
CHARLES ELMORE CR

Supreme Court of the United States

OCTOBER TERM, 1935

No. 268

THE SUGAR INSTITUTE, INC., THE AMERICAN SUGAR REFINING COMPANY, MARGARET A. JAMISON, ET AL.,

Appellants,

v.

THE UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

APPELLANTS' REPLY MEMORANDUM IN OPPOSITION TO APPELLEE'S SUGGESTION OF A DIMINUTION OF THE RECORD AND MOTION FOR A WRIT OF CERTIORARI.

SULLIVAN & CROMWELL,
Solicitors for Appellants,
48 Wall Street,
New York, N. Y.

JOHN C. HIGGINS,
Of Counsel.

Supreme Court of the United States

OCTOBER TERM, 1935

No. 268

THE SUGAR INSTITUTE, INC., THE AMERICAN SUGAR REFINING COMPANY, MARGARET A. JAMISON, *et al.*,

Appellants,

v.

THE UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANTS' REPLY MEMORANDUM IN OPPOSITION TO APPELLEE'S SUGGESTION OF A DIMINUTION OF THE RECORD AND MOTION FOR A WRIT OF CERTIORARI.

By its present motion, the Government seeks to add to the record on appeal, already 2,400 pages in length exclusive of approximately 2,400 exhibits filed with the Clerk of the Court, another 32 pages of narration and 73 additional exhibits. The discussion of the four points with which this additional material deals covered approximately 75 pages of the briefs submitted by Petitioner and Defendants in the District Court. In opposing the present motion,

Appellants are anxious to avoid the further lengthening of a record already of extreme length and even more anxious to avoid the necessity of devoting time on oral argument or space in the briefs to any review, discussion or explanation of matters not involved upon the appeal.

Paragraph 2 of Rule 10 of this Court requires the transmission and certification to this Court of only *"the material parts of the record"*. In *Louisville & Nashville R. R. Co.* v. *United States,* 238 U. S. 1, 10 (1914), this Court stated that the Federal Equity Rules required "a condensation into narrative form of *what is material to the then issue before the Court"*. Federal Equity Rule 75(b) provides that:

> "The evidence to be included in the record, except expert testimony, shall not be set forth in full, but shall be stated in simple and condensed form, *all parts not essential to the decision of the questions presented by the appeal being omitted,* and the testimony of witnesses being stated only in narrative form, save that if either party desires it, and the court or judge so directs, any part of the testimony shall be reproduced in the exact words of the witness.* * *"

The material which the Government now seeks to add to the record on appeal was omitted therefrom by Appellants pursuant to the Rules promulgated by this Court. The argument now made by the Government in favor of the inclusion in the record of this material was made before the Trial Judge of the District Court who ruled that:

> "The statement of evidence in narrative form, prepared, lodged, and submitted by appellants for approval, a copy of which is attached hereto, is

hereby approved as being a true, complete, and properly prepared statement of the evidence received on the trial of this cause and relevant to the questions presented on the appeal.

"The additional statement of evidence in narrative form, attached to 'Appellee's praecipe for additional portions of the record', and the exhibits of appellee and appellant designated in said praecipe of appellee are certified to be correct but are not to be included in the transcript of the record on appeal, said statement and exhibits not being essential to the decision of the questions presented by the appeal."

It is submitted that the exclusion of this material was not only proper but mandatory under the Rules promulgated by this Court and that the Government's motion should be denied. None of the evidence involved is either "material to the issue before the Court" or "essential to the decision of the questions presented by the appeal." The evidence in question involves four points, none of which are raised upon the appeal because on all four points the finding of the Trial Court was in favor of Appellants and adverse to the contentions of the Government.

1. Evidence Regarding Fines and Penalties.

Paragraph T (44) of the Petition charged that:

"Defendants at various times during the existence of the conspiracy herein described have agreed upon and concertedly adopted, as part of the comprehensive program for enforcement of the Code: * * * provisions for fines up to $1,000, plus 10% of the amount involved in any sale held by the Institute to be in violation of the Code;" (R. 17, 18.)

Paragraph 43 of the Answer alleged that:

> "* * * at one time a resolution was tentatively adopted by the Board of Directors of the Institute, containing a provision for fines upon members not exceeding $1,000, and in the case of a sale of sugar found to have been made under circumstances at variance with the provisions of the Code of Ethics, an additional fine not exceeding 10% of such sale; but they allege that the resolution failed to meet with the approval of the members, and the Board of Directors of the Institute, upon learning further that the United States Government objected to a provision of such character, rescinded its resolution, and said provision never was or has been, and is not now in force and effect." (R. 44.)

With respect to this allegation of the Petition, the Trial Court found for the defendants:

> "A resolution embodying a system of fines to be imposed upon members for violations of the Code, was adopted by the directors in June, 1930, but no fine seems ever to have been imposed and in January, 1931, the resolution was formally rescinded. While most of the refiners assented to the plan and Institute officials as well as some refiners deemed it operative, two of them did not assent thereto and some of them believed that it never became operative. Defendants' confusion in this matter was genuine. I deem defendants' attempt to devise a system of fines abortive and of no importance." (R. 312.)

The Government has not appealed from this finding. No issue with respect thereto is raised before this Court. The evidence introduced by both parties, upon which this unchallenged finding is based, is not now material. In so

far as the Government may wish to make the point that defendants attempted to enforce compliance with restraints held illegal by the District Court, they need only refer to the specific finding of the District Court with respect thereto. No useful purpose would be served encumbering the record with either the additional narration or exhibits set forth in the Appendix to the Government's present motion, upon which rests a finding that the Government has not asked this Court to reverse.

2. Evidence Regarding Alleged Blacklisting of Sugar Distributors.

Paragraph T (44) of the Petition charged that:

> "Defendants at various times during the existence of the conspiracy herein described have agreed upon and concertedly adopted, as a part of the comprehensive program for enforcement of the Code: * * * blacklisting of customers;" (R. 17)

In paragraph 43 of the Answer, defendants denied:

> "* * * that as a part of such enforcement program or otherwise, they have agreed upon the blacklisting of customers or have blacklisted any customer or customers." (R. 44)

With respect to this matter, the Trial Court found as follows:

> "Under Institute practice, a customer who fails to complete his contract according to its legal effect and who is on that account, denied credit by the refiner, is reported to the Institute. His name, but not that of the refiner reporting him is then circulated to the members. I find no undue or unrea-

sonable restraint of trade in any agreement so to report or to circulate such fact. I further find that there was no general understanding or agreement among defendants to blacklist customers so reported" (R. 313).

From this finding, the Government has taken no appeal. Yet, by this motion, it seeks to bring before the Court all of the evidence which it presented below for the purpose of inducing the Trial Court to arrive at a contrary conclusion and which evidence the Trial Court found insufficient to substantiate the charge made.

In its effort to reopen the question, the Government goes beyond the findings of the Trial Court to the opinion for statements as to what some of this evidence "tended to show". However, in addition to the observations in the opinion referred to by the Government, the Court went on to state affirmatively the reasons why the memoranda emphasized by the Government were of little significance:

> "However, responsible officials of a number of refiners testified that the lists of reported customers did not affect their sales policy. Moreover, defendants have introduced the sales records of a number of the refiners; in all nearly 150 customers were reported during the period covered. Defendants' unchallenged compilation thereof with respect to the refiners whose records were produced, shows that despite the Institute reports, American continued to sell 62% of its customers reported by other refiners, National 81½%, Arbuckle 89%, Revere 80% and Pennsylvania 74%.
>
> "I therefore deem the McCahan documents insufficient to establish an understanding on the part of the defendants generally to blacklist reported customers. That may have been Place's under-

standing and his belief as to the others. But the evidence is too inconclusive, especially in view of the countervailing evidence, to establish an agreement in this respect.

"Plaintiff's argument that defendants' report of such customers only as had been stricken from refiners' lists indicates a blacklisting scheme, is unconvincing. Defendants explain that such names alone were reported in order to simplify the refiners' reports to the Institute and to provide information as to those customers whom refiners deemed the most serious offenders against contract terms. In my judgment, such information would be legitimately of greater interest in determining credit policy than a report of all customers who had repudiated or cancelled contracts." (R. 232-33)

The narrative statements and exhibits referred to by the Government deal solely with the question of alleged blacklisting and circulation of credit information and add nothing whatsoever to the findings of the Court quoted above. The Government suggests that these exhibits be added to the record on the ground that they "also relate to the Institute's enforcement of contract terms" and the decree "enjoins *various activities* concerning the enforcement of contract terms." These exhibits do not relate to the enforcement of contract terms except in so far as they relate to the circulation of credit information, which activity was expressly approved by the Court and does not constitute one of the various activities enjoined. They have no bearing whatsoever upon any issue other than the question of blacklisting which, in view of the Court's findings is not in issue upon the appeal. In so far as the unwillingness of the Trial Court to accept Place's explanation of certain documents bears on the weight to be given

to his other testimony, the observations in the opinion with respect thereto are clearly sufficient. The testimony and the documents themselves, having no substantive importance, are wholly immaterial and were properly excluded from the record on appeal by order of the Trial Court.

3. Evidence Regarding Alleged Attempted Bribes by an Institute Investigator.

The narrative statements and exhibits which the Government seeks to introduce under this heading were disposed of by the Trial Court in a single sentence of the opinion:

> "Plaintiff charges, in connection with this matter, that an Institute investigator encouraged by Institute officials sought to bribe an Edgar employee to reveal certain records of that firm; in my judgment, as to this, the burden of proof has not been sustained." (R. 160.)

In view of this finding, from which the Government has taken no appeal, the evidence which the Government seeks to introduce is wholly irrelevant to any of the issues before this Court. Rejected by the Trial Court, it is not "directly related to the Institute's system of investigations" or to any other question raised upon the appeal. The excerpt from the opinion, quoted in the Government's motion, deals solely with the question of investigations of refiners' *own* records and is wholly foreign to the question of alleged bribes again sought to be interjected. Alleged bribes were not found by the Trial Court to constitute part of the enforcement activities of the Institute. The evidence in ques-

tion was properly excluded from the record on appeal by the Trial Court.

4. Evidence Regarding Alleged Allocation of Territory.

Under this heading, the Government seeks to add to the record on appeal a series of exhibits referring to Western's withdrawal from certain markets offered for the purpose of establishing an alleged "allocation of territory". With reference to these exhibits the Court stated as follows:

> "Plaintiff also seeks to show that Western was persuaded to withdraw from competition in Indiana, Ohio, Kentucky and Tennessee through efforts of other refiners. Some of the defendants' telegrams and letters support this charge. But there is, too, evidence that Western withdrew because its venture in this section was unsuccessful. In any event, the matter does not appear to have been important. It occurred during the first year of the Institute and there is no evidence showing similar incidents thereafter. Moreover, statistical analyses offered by defendants, as well as testimony of an economic expert, in reference to one of them strongly support defendants' contention that there has been no allocation of territory. (See Exs. J-15, F-15, R. 10490-91.)
>
> "In such circumstances, plaintiff has shown no substantial basis for a fear that defendants are likely to concern themselves with such matters. I shall therefore deny relief with respect thereto." (R. 230.)

In view of the language above quoted the complete immateriality of the exhibits sought to be added to the record is

obvious. The Court refused to sustain the Government's charge that defendants allocated territory and these exhibits are *not* material, as alleged by the Government, for the purpose of "showing the extent to which defendants' activities through the Institute resulted in understandings not to compete with each other." They were properly excluded from the record on appeal.

CONCLUSION

A very great number of issues, embracing the whole scope of Trade Association activities under the Sherman Act, are raised by this appeal and Appellants' brief will necessarily be of more than usual length. Because of this fact we are anxious to avoid adding to the length of the brief by reviewing again the testimony and exhibits here sought by the Government to be added to the record on appeal. Without exception, they relate to unfounded charges, to questions no longer in issue and are wholly irrelevant to any of the issues raised by the appeal. They were properly excluded from the record on appeal by the District Court and the Government's motion for a writ of certiorari should be denied.

Respectfully submitted,

SULLIVAN & CROMWELL,
Solicitors for Appellants.

JOHN C. HIGGINS,
Of Counsel.